Kay Hian Pte Ltd v Ma Boon Lan

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO Q-02-425 OF 2001

ABDUL HAMID MOHAMAD, MOHD NOOR AHMAD AND PS GILL JJCA

8 AUGUST 2003

Civil Procedure *— Res judicata — Decision, finality of earlier decision — Evidence admitted and marked without demur — Replacement trial judge proceeding to hear closing submissions — Replacement trial judge overruling admissibility of evidence admitted by his predecessor — Whether court could reopened its earlier procedural ruling — Whether replacement judge, not hearing the matter de novo, could re-evaluate admissibility of evidence — Whether matter res judicata in this case*

Evidence *— Documentary evidence — Admissibility of — Books of account regularly kept in course of business — Entries in books of accounts — Whether admissibility of such evidence must first be established — Whether deals with relevancy and/or admissibility of evidence — Evidence Act 1950 ss 34, 73A, 90(2) and (3), 90A(2) and (3)*

The plaintiff was a firm of stockbrokers. The defendant had certain trading facilities relating with the plaintiff. By an agreement between them governing the shares margin, the defendant appointed plaintiff's remisier, one William Wee, as the defendant's agent. The plaintiff claimed certain monies from the defendant. The defendant denied owing the sum to the plaintiff and counterclaimed for conversion of his shares held by the plaintiff. In the course of the trial, the plaintiff did not produce the contract notes relating to the claim. The manager of the plaintiff stated that the request for copies of the contract notes was made some eight years after the transactions had taken place. The company's records were kept only for seven years, hence the inability of the company to comply with defendant's request. Certain documents were then introduced as exhibits at the trial before the first trial judge, and the defendant raised no objection. These documents were admitted and marked accordingly. The first trial judge, having the case in part, left the judicial service without the benefit of hearing submissions of counsel at the close of the case. By consent, these submissions were heard by the second trial judge who took over the conduct of the case. The defendant, in his submission before the second trial judge, objected to the admission of the documents in evidence. The second trial judge then overturned the ruling of the first trial judge as to the admissibility of the exhibits. The second trial judge then dismissed the plaintiffs claim and allowed the counterclaim of the defendant. The two main issues here were, firstly, whether a party could raise a valid objection at the conclusion of a trial to documents properly tendered and marked, and not objected to by counsel when the documents were first tendered and, secondly, whether a trial judge who only heard submissions at the end of a trial could overturn the ruling of the trial judge who had heard the evidence at the trial, and had admitted the evidence.

Held, allowing the appeal and dismissing the defendant's counterclaim: A

(1) Addressing the second issue first, once a trial judge makes a ruling, whether substantive or procedural, whether final or interlocutory, it must be adhered to and the issue may not be reopened without cause. The only exception to this is where the B court plainly lacked jurisdiction to make the order complained of, and the order in question has not been drawn up and perfected. The ruling of the second trial judge on the admissibility of the documents, which had already been ruled admissible by the first trial judge, would be in error, as it militates against the doctrine of res judicata (see p 611D–G); *Harrison v Harrison* [1955] 1 Ch 260 C distinguished and *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 followed.

(2) As a rule, since the case was not heard *de novo*, the second trial judge was entitled, with the consent of the parties, to recall and examine any witness, and the parties were given the liberty to re-submit on any point previously canvassed. But the second trial D judge here merely re-heard submissions by counsel at the end of the case. There was no re-submission on any procedural issues, and hence the second trial judge's ruling on the admissibility of the said documents in his grounds of judgment was flawed (see pp 611H–612A); *Shanmugam v Pitchamany & Anor* [1976] 2 E MLJ 222 distinguished.

(3) The second trial judge took the view that admissibility of the document must be established solely by virtue of s 73A Evidence Act 1950 ('the Act') . He thought that s 34 of the Act only deals with relevancy, and not admissibility of the documents. The Court of Appeal disagreed, finding that s 34 of the Act deals with F both the admissibility, and relevancy pertaining to the entries in the book of accounts (see p 612G–H); *Sim Siok Eng & Anor v Poh Hua Transport and Contractor Sdn Bhd* [1980] 2 MLJ 12 followed.

(4) Although no certification was issued pursuant to s 90A(2) of the Act, the evidence tendered by PW2 was material evidence, in lieu G of this certificate. The witness had categorically stated that he had no reason to believe that the exhibit was not produced by their computer system, and went on to describe the activities for which the computer was used. The viva voce evidence of the witness falls within the short compass of s 90(2) and (3) of the Act and effectively fills the pre-requisite of s 90(A) (2) and (3) of the Act H (see p 613E–F).

(5) Although no contract notes were produced by the plaintiff to the defendant for reasons given at the trial, there is no dispute that the transactions had taken place. The defendant merely disputed that these transactions had been carried out on his instructions. The contract notes would not show whether the transactions were I made on the instruction of the defendant or not. But the evidence was that the remisier, while working as a remisier at the plaintiff's

office, had been appointed the agent of the defendant under the agreement between the parties (see p 615D–E).

[Bahasa Malaysia summary

Plaintif adalah sebuah firma broker saham. Defendan mempunyai kemudahan perniagaan dengan plaintif. Melalui suatu perjanjian antara mereka yang meliputi margin saham, defendan telah melantik remisier plaintif, seorang bernama William Wee, sebagai wakil defendan. Plaintif menuntut jumlah tertentu daripada defendan. Defendan menafikan terhutang kepada plaintif dan menuntut balas pengembalian sahamnya yang dipegang palintiff. Semasa perbicaraan, plaintif tidak dapat mengemukakan nota kontrak berkaitan tuntutan. Pengurus plaintif menyatakan bahawa permohonan bagi salinan nota kontrak hanya dibuat hampir lapan tahun selepas transaksi dibuat. Rekod syarikat plaintif hanya disimpan selama tujuh tahun, maka plaintif tidak dapat memenuhi permintaan defendan. Beberapa dokumen telah dikemukakan sebagai keterangan dalam perbicaraan dihadapan hakim perbicaraan pertama, dan defendan tidak mengemukakan sebarang bantahan. Dokumen ini telah diterima dan ditandakan seperti dikehendaki. Hakim perbicaraan pertama, setelah mendengar sebahagian kes, telah meninggalkan perkhidmatan keadilan tanpa mendengar hujah-hujah peguam pada penghujung kes. Dengan izin, hujah-hujah ini telah didengar oleh hakim perbicaraan kedua yang mengambil alih perbicaraan kes ini. Defendan, dalam hujahnya di hadapan hakim perbicaraan kedua, telah membantah kemasukan dokumen tersebut sebagai keterangan. Hakim perbicaraan kedua telah mengakaskan arahan hakim perbicaraan pertama akan kemasukan dokumen itu sebagai keterangan. Hakim perbicaraan kedua kemudian telah menolak tuntutan plaintif dan membenarkan tuntutan balas defendan. Dua isu yang penting di sini adalah, pertama, sama ada sesuatu pihak dapat membuat bantahan yang sah pada penghujung perbicaraan kepada sesuatu dokumen yang telah diterima dan ditanda, dan tidak dibantah oleh peguam semasa dokumen mula-lmula dikemukakan dan, kedua, sama ada seseorang hakim perbicaraan yang hanya mendengar hujah-hujah pada penghujung perbicaraan dapat mengakaskan arahan hakim perbicaraan yang telah mendengar keterangan semasa perbicaraan dan menerima keterangan itu.

Diputuskan, membenarkan rayuan itu, menerima keterangan itu, memasukkan penghakiman bagi plaintif dan menolak tuntutan balas defendan:

(1) Mengenai isu kedua terlebih dahulu, sebaik sahaja seseorang hakim perbicaraan membuat satu keputusan, samada substantif atau prosedur, samada muktamad atau interlokutori, ia mesti dipatuhi dan tidak boleh dibuka semula tanpa alasan munasabah.

Satu-satunya pengecualian kepada kaedah ini adalah sekiranya mahkamah jelas tidak mempunyai bidang kuasa membuat perintah yang diadu itu, dan perintah tersebut belum lagi ditandatangani dan dikemaskinakan. Arahan hakim perbicaraan kedua akan keesahan kemasukkkan dokumen itu, yang telah pun diarahkan dapat diterima oleh hakim perbicaraan pertama, adalah tersilap, memandangkan ia melanggar doktrin res judicata (lihat ms 611D–G); *Harrison v Harrison* [1955] 1 Ch 260 dibeza dan *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 diikut.

(2) vLazimnya, memandangkan yang kes ini tidak didengar *de novo*, hakim perbicaraan kedua berhak, dengan keizinan pihak-pihak, memanggil kembali dan memeriksa sebarang saksi witness, dan pihak-pihak dapat berhujah kembali pada sebarang isu yang pernah dipertikaikan sebelumnya. Tetapi hakim perbicaraan kedua di sini hanya telah mendengar kembali hujah-hujah peguam pada penghujung kes. Tiada sebarang hujahan semula pada sebarang isu prosedur maka arahan hakim perbicaraan kedua akan kemasukkan dokumen itu dalam alasan penghakimannya adalah tidak wajar (lihat ms 611H–612A); *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222 dibeza.

(3) Hakim perbicaraan kedua mengambil pandangan kemasukkan dokumen itu perlu ditegakkan semata-mata berdasarkan s 73A Akta Keterangan 1950 ('Akta tersebut'). Ia menganggap s 34 Akta tersebut sekadar menyentuh isu relevansi, dan bukannya kemasukkan dokumen. Mahkamah Rayuan tidak setuju, mendapati s 34 Akta itu menyentuh kedua-dua isu kemasukkan mahupun relevansi berkaitan catatan dalam buku akaun (lihat ms 612G–H); *Sim Siok Eng & Anor v Poh Hua Transport dan Contractor Sdn Bhd* [1980] 2 MLJ 12 diikut.

(4) Walaupun tiada sebarang sijil perakuan dikeluarkan seperti dikehendaki dibawah s 90A(2) Akta itu, keterangan yang dihadapkan PW2 ada berkaitan, tanpa sijil pengakuan. Saksi ini telah menegaskan bahawa tiada sebarang alasan ia percaya bahawa ekshibit yang dikemukakan tidak dikeluarkan oleh sistem komputer mereka, dan seterusnya telah menerangkan cara komputer itu digunakan. Keterangan *viva voce* saksi ini dirangkumi s 90(2) dan (3) Akta itu dan memenuhi kehendak s 90(A) (2) dan (3) Akta itu (lihat ms 613E–F).

(5) Walaupun tiada nota kontrak dikemukakan oleh plaintif kepada defendan di atas alasan yang diberikan semasa perbicaraan, tiada sebarang pertikaian bahawa transaksi tersebut telah berjalan. Defendan semata-mata mendakwa transaksi itu berjalan tanpa arahan darinya. Nota kontrak tidak dapat menunjukkan samada sesuatu transaksi dibuat atas arahan defendan atau sebaliknya. Tetapi adalah menjadi keterangan bahawa remisier, mahupun sedang berkhidmat sebagai remisier di pejabat plaintif, telah

dilantik sebagai agen kepada defendan di bawah perjanjian antara pihak-pihak (lihat ms 615D–E).]

Notes

For cases on res judicata decision, finality of earlier decision, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 5102–5118.

For cases on the admissability of documentary evidence, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1048–1056.

Cases referred to

Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd [1996] 2 MLJ 57 [1996] 2 MLJ 57 (folld)

Mui Bank Bhd Johore v Tee Puat Kuay [1993] 4 CLJ 69 (refd)

Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd [1989] 3 MLJ 360 (refd)

Shanmugam v Pitchamany & Anor [1976] 2 MLJ 222 (distd)

Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun [1981] 1 MLJ 201 (refd)

Sim Siok Eng & Anor v Poh Hua Transport and Contractor Sdn Bhd [1980] 2 MLJ 72 (folld)

Legislation referred to

Evidence Act 1950 ss 34, 73A, 9090(2), (3), 90A(2)

Appeal from: Suit No MR 83/1987 (High Court, Miri)

Tai Choi Yu (*Tai Choi Yu & Co*) for the appellant.

Jimmy HT Wee (*Patrick Liaw* with him) (*Jimmy HT Wee & Co*) for the respondent.

PS Gill JCA (delivering judgment of the court): The plaintiff, a firm of stockbrokers in Singapore, and a member of the Singapore Stock Exchange claim a sum of S$21,993.41 from the defendant as on the 1 October 1985 with interest thereon at the rate of 1.2% per mensem from 1 October 1985 'for full payment payable, and owing under an agreement dated 15 October 1984. Under the term of the agreement, the defendant requested, and was granted certain credit, and trading facilities relating to transaction and/or trading and/or sale and purchase of public listed shares.

The defendant denied the claim, and instead counterclaimed for the return of 287,000 shares pledged with the plaintiff as security for margin facilities S$500,000 and/or in the alternate damages for the conversion of the shares by the plaintiff amounting to a sum of $366,106.36.

The learned trial judge dismissed the plaintiffs claim with costs, and allowed that counterclaim of the defendant with costs.

The agreed facts (marked 'F' by the court on 9 February 1998) dated 3 March 19997: are as follows:

(1) The plaintiff is and was at all material times stockbroker and member of the Singapore Stock Exchange.

(2) The defendant entered in to an agreement with the plaintiff on the 15 October 1984 whereby the plaintiff, at the defendant's request, agreed to grant credit facilities to the defendant to pay for the shares to be purchased by the defendant from or through the plaintiff and the defendant further agreed and undertook, inter alia:

  (a) that the plaintiff shall hold all the shares purchased by the defendant as security for the outstanding credit facilities;

  (b) that the defendant shall deposit as collateral security with the plaintiff a sum equivalent to S$3 for every S$10 worth of shares purchased by the defendant on credit from the plaintiff;

  (c) that if at any time after such purchase and/or at any time during the credit period the shares and/or other securities held by the plaintiff as collateral security fall in value the defendant shall within five days from the receipt of the plaintiffs notice in writing deposit such further sum or sums of monies and/or other securities as are required and accepted by the plaintiff as further collateral security;

  (d) that the defendant will pay interest for the outstanding credit facilities at the rate of 1.2% per mensem or at such other rate as the plaintiff may by notice impose, such interest to be paid every 30 days with or without formal demand from the plaintiff failing which all outstanding and/or unpaid interest shall be deemed to become part of the defendant's principal debt to the plaintiff and interest shall be paid also on such outstanding and/or unpaid interest sums at the aforesaid rate until full settlement;

  (e) that if the defendant shall be in breach of any conditions contained in the said agreement, the plaintiff may without notice to the defendant:

    (i) terminate all credit arrangements and, at the plaintiffs own judgment as to timing, dispose of by private treaty and/or through the Stock Exchange the shares held by the plaintiff; and

    (ii) if the proceeds of the sale of the shares are insufficient to satisfy the sums owing by the defendant to the plaintiff, the plaintiff shall be at liberty and without notice to the defendant to utilize all sums of cash and sell and/or dispose of all securities held and/or deposited with the plaintiff as collateral security to satisfy such outstanding sums as are owing by the defendant to the plaintiff;

(f) that the defendant irrevocably appoints the plaintiffs remisier William Wee as the defendant's agent to receive all and any notices, certificates, contract notes, demands and proceedings that are sent to the defendant, and, that all the said notices, etc. served and/or signified as received by the said agent shall be deemed to be duly served and received by the defendant;

(g) that notwithstanding the security and collateral security given by the defendant to the plaintiff, the defendant will be responsible for all outstanding sums owing by the defendant to the plaintiff and the plaintiff may take any action necessary until the plaintiff recover 100 cents to the

(h) dollar in respect of any outstanding debt to the plaintiff; and

(i) that a statement or certificates by any of the plaintiffs authorized officers as to the monies commissions liabilities for the time being owing or incurred by the defendant and/or as to any valuation of securities shall be final and binding on the defendant, and that any challenge to any computation of valuation may only be made by the defendant within two days of the receipt of the same.

The trial judge who heard the case was Elizabeth Chapman JC ('the first trial judge'). Unfortunately, her Ladyship left the judicial service without having the benefit of hearing the submissions of counsel at the close of the case. By consent, the submissions were heard by Hasan J ('the second trial judge') who had taken over the conduct of the case. We have mentioned these facts, as they would have some bearing on our reasons later on in the grounds of judgment.

Both the plaintiff and the defendants agree that an agreement was entered into between them dated 15 October 1984, and that the terms of the agreement govern the shares margin, and business transactions between the parties. The plaintiffs evidence was that it was the defendant who had breached the agreement. The agreement executed by the defendant gave him a trading limit to purchase shares on a settlement basis to the value of $500,000. The application form was signed by him, and witnessed by Mr William Wee who was a remisier, and duly appointed agent of the defendant. The agreement also stated that the defendant was bound by the terms of the agreement.

It was the plaintiffs contention that at the defendant's request which was communicated to the plaintiff from time to time, various share transactions were carried on between the parties, commencing on 16 October 1984 till 30 September 1985. According to the plaintiff, the defendant deposited 62,000 shares as additional collaterals in August 1985, and the relationship between the plaintiff and the defendant was good till August 1985.

On the 3 September 1985, the plaintiff issued a notice to the defendant for margin call, and the shares purchased by the defendant and/or the collaterals fell in value to the extent that the defendant was required to pay top-up to the value of S$143,000. However, the defendant failed to do so, **A** and consequently the plaintiff terminated the facilities, sold the shares held by the defendant, resulting in a nett amount of SS21.993.41 owing to the plaintiff.

Defendant denied owing the sum of S$21,993.41 to the plaintiff. He admitted that he traded in the buying and selling of shares through the **B** plaintiff but he was emphatic that his transaction did not breach the limit of S$500,000 granted to him. He denied asking for an increase in his credit facilities, and also denied that he had pledged an additional collateral to the plaintiff, apart from the 287,000 shares initially pledged to the plaintiff, in 1984, the value of which, in his view, was more than sufficient to meet his obligation without having to break a margin call. Lastly, he denied having **C** instructed the Plaintiff or his agent to sell any of the 287,000 collaterals, and therefore filed a counterclaim for the return of the collateral, or damages.

In the course of the trial, plaintiff did not produce the contract notes relating to the claim. PW3, Vincent Goh Swee Chew who was the Manager of the Margin Department of the plaintiff company stated that the **D** defendant requested for copies of the contract notes on 16 December 1993 — eight years after the transactions had taken place. The company records were kept only for seven years, and hence the inability of the company to comply with defendant's request. From the outset, we wish to state that we are in agreement with the learned trial judge that the non-production of the contract notes is not fatal to the plaintiffs case. This is because there is no **E** dispute that the transactions contained in P5(B)(1)– (38) were carried out. What is disputed upon, we find is whether the transactions were carried out on the instructions of the defendant or not.

The plaintiff at the trial which commenced on 6 March 1997, some 12 years after the transaction had taken place produced the following **F** documents to support its claim:

(a) A handwritten ledger allegedly containing the entries of all the buy and sell transactions of the defendant from 16 October 1984 to 30 September 1985 including the sale of the collaterals (287,000 shares) and the additional collaterals (62,000 shares) **G** held. This handwritten ledger is marked exh PSB(1)–(38) in Bundle E at pp 2–39. It was reproduced in computer print-out by the defendant at pp 40(1)–40(38) in Bundle E.

(b) Certified copy of a computerized monthly account marked as 'P4A' allegedly from which the handwritten ledger was **H** produced.

(c) Summary of account dated 21 November marked as exh P8 containing a summary of account allegedly owned by the defendant to the plaintiff which information was extracted also from the handwritten ledger. **I**

(d) Exh Pl Diary kept by PW1 of all transactions relating to the trading of shares by the defendant.

At the outset, it must be borne in mind, that when the abovementioned documents were introduced as exhibits at the trial before the first trial judge, counsel for the defendant raised no objection, and as such they were properly admitted, and marked accordingly.

More pertinently, however, was the fact that these very documents later formed the basis of serious objection by counsel for the defendant in his submission at the close of the case before the second trial judge who then overruled the ruling of the first trial judge on the admissibility of the said exhibits.

Now two issues arise here that we consider relevant. Firstly, can counsel raise a valid objection at the conclusion of a trial to documents properly tendered, and marked at a trial, and not objected to by counsel, when the documents were first tendered as exhibits?

Secondly, and more important than that, can a judge who hears only submissions at the end of a trial overrule the ruling of the trial judge who had heard evidence at the trial, and had properly admitted the exhibits?

We begin by addressing the second issue, and can do no better than reiterate the principles enunciated in the case of *Hartecon JV Sdn Bhd & Anor v Hartela Contractors Ltd* [1996] 2 MLJ 57 at p 66, on the issue of a finality of a ruling made by a judge on issues of procedure such as the admissibility of documents as in the present case. This court has stated in clear and lucid terms as follows:

> We cannot over emphasize the proposition that once a judge makes a ruling substantive or procedural, final or interlocutory, it must be adhered to and may not be reopened wily-nilly. One may ask: how is this approach to be reconciled with the decision in *Harrison v Harrison* [1955] 1 Ch 260? The answer to that question lies in recognizing that the principle for which that case is authority applies only where it is demonstrated that the court plainly lacked jurisdiction to make the order complained of: provided, of course, that the order in question has not been drawn up and perfected. To extend the scope of that principle would be to effectively demolish the requirements of certainty and finality which are the two pillars on which the judicial process rests.

On the strength of the abovementioned dicta, the ruling of the secondon the admissibility of the said documents that were ruled admissible by the first judge would be in error, as it militates against the doctrine of res judicata.

But the matter does not rest here, for the matrix in this case is slightly different in that, the case was continued by the second trial judge, on the retirement of the first trial judge. As a rule, since the case was not heard de novo, the second trial judge was entitled with the consent of the parties to recall, and examine any witness that he may wish, and the parties are given the liberty to resubmit on any point previously canvassed (see *Shanmugam v Pitchamany & Anor* [1976] 2 MLJ 222).

By allowing parties to resubmit on any point, we would take it to mean that a different ruling on a previously raised procedural issue could be made by the second trial judge. Was this the case in this instance? We think not, as the second trial judge reheard merely submissions by counsels at the end of the defence case. There was no re-submission to speak of on any procedural issues, and hence the second trial judge's ruling on the admissibility of the said documents in his grounds of judgment was flawed.

In the event, we are held wrong on both courts, we now address our mind to the admissibulty on each of the documents held to be inadmissible by the second judge. Forefront to our minds, is that inadmissible evidence does not become admissible simply by reason of failure to object (see *Popular Industries Limited v Eastern Garment Manufacturing Sdn Bhd* [1989] 3 MLJ 360, and *Mui Bank Bhd Johore v Tee Puat Kuay* [1993] 4 CLJ 69).

NOW WHAT ABOUT THE DOCUMENT

Handwritten ledger exh P5(B)(1)–(38)

In respect of the exhibit, much was made if the fact that the handwritten ledger was prepared by the Margin Department of the plaintiff company, and not PW1. PW1, according to the evidence, was not able to confirm when the information to prepare the ledger comes from. Ideally the maker of the said document should have been called, but was not. It is apparent, however, that the relevance of the document cannot be underscored.

Counsel for the plaintiff had attempted to introduce the said exhibit under the provisions of s 34 of the Evidence Act 1950 ('the Act'). Section 34 of the Act contemplates two conditions of admissibility in respect of the handwritten ledger viz-a-viz:

(a) the entries are in a book regularly kept in the course of business; and

(b) the entries therein refer to a matter into which the court has to inquire per Salleh Abas FJ (as he then was) in *Sim Siok Eng & Anor v Poh Hua Transport and Contractor Sdn Bhd* [1980] 2 MLJ 72.

Failure to prove these conditions of admissibility would render the book of accounts inadmissible, as per Salleh Abas FJ. (as he then was) in *Syarikat Jengka Sdn Bhd v Abdul Rashid bin Harun* [1981] 1 MLJ 201, at p 203 (FC).

So much for the law and now to the matter before us. We are not in agreement with the reasoning of the learned trial judge that s 34 of the Act only deals with relevancy, and not admissibility of the said documents. The trial judge took the view that admissibility of the document must be established solely by virtue of s 73A of the Act.

We disagree, simply because we find on the strength of the authority of *Sim Siok Eng*, s 34 of the Act deals with both the admissibility, and relevancy pertaining to the entries in the book of accounts.

Proof of the condition that the entries refer to a matter into which the court has to enquire would generally we feel pose no problem. We find what is of concern here is proof that the entry in the said book of accounts is regularly kept in the course of business.

We hold that judging from the said exhibit, and the system in which it was kept, it is clear beyond doubt that the making of the entries in the ledger does indicate, it is a book of accounts kept as business. We are further fortified by the evidence of PW3 on the manner in which the accounts were maintained in the ledger in the past, and present.

For these reasons, we find that the entries in the handwritten ledger P5(B)(1)–(38), and the summary of accounts marked as P8 which was culled from P5(B)(1)–(38) are admissible, and relevant as evidence against the Defendant.

Certified copy of computerized monthly account P4A

In respect of the exhibit, the learned trial judge had ruled against the admissibility of this document, as he felt that the requirements of s 90A(2) of the Act had not been complied with. Further, it was the contention of the trial judge that he was unable to agree with the proposition put forward by the plaintiff's counsel that the said exhibit was a distinct document of the Singapore Stock Exchange as the input of this document was in fact keyed in by the plaintiff using the computer system of the Singapore Stock Exchange. As the person who keyed it in was not called as a witness, the trial judge opined that the document was not admissible.

Though we were initially perturbed that no certification was issued pursuant to s 90A(2) of the Act in respect of the certified computerized monthly account (P4A) we find that the evidence tendered by PW2, Daniel Tan Bak Hiang, is material evidence, in lieu of this certificate. The said witness had categorically stated that he had no reason to believe that the said exhibit was not produced by their computer system, and went on to describe the activities for which the computer was used. To our minds, the viva voce evidence of the witness falls within the short compass of s 90(2) and (3) of the Act and effectively fills the pre-requisite of s 90(A)(2) and (3) of the Act.

The trial judge had further ruled against the admissibility of P4A on the grounds that the person who keyed in the information into the computer system of the Singapore Stock Exchange was not called as a witness. Once again, we believe that the trial judge fell into error as he seemed to have failed to appreciate the impact of s 90A which allows the admissibility of documents produced by computer, and of statements contained therein subject to the requirements being satisfied. The weight, however, to be attached to the document, is we believe, another matter. To thus to reject P4A as the trial judge did on the basis that the person who keyed in the information was not called as a witness is with respect, fallacious.

As to the weight to be attached to P4A, we find no reason to doubt the veracity of PW2's evidence, or the accuracy, and purpose of the said document. No strenuous challenge was made, as to the supply of such information, and to that end we hold the document P4A should be given due weight.

It is thus our considered view that the exhibit P5B(1)–(38), and P4 are admissible.

And now to the disputable facts

The main bone of contention between the plaintiff and defendant was that the defendant alleged that he never instructed plaintiff to sell the 287,000 shares pledged by him as collateral securities. In this respect, the defendant denied receiving any margin call notices from plaintiff informing him that for the securities held by the plaintiff the margin of the securities was short of S$143,000. In fact, PW1, William Wee, the agent of the defendant, stated that he immediately informed the defendant of the said notices by phone. Wee had also met the defendant in Miri on 24 August 1985 to confer with the defendant on need to top-up the securities. The failure by the defendant to top-up his account resulted in the sale of the collateral securities as provided for in cl 5(b) of the agreement.

It must be noted that both PW2, PW3 and PW4 all testified that the defendant owed the plaintiff S$21,993.41 as on 1 October 1985. PW2 stated that according to exhP4A the Stock Exchange print-out, the ledger entry dates were stated in the printout, and was adamant that the exhibit was accurate. PW3 tendered exhs PSA, and P5B(1)–(38) the plaintiffs hand written ledger account (1984–1985). He reiterated that the notice of margin call was served on the defendant's remisier, PWI, as well as the defendant on 3.9.85. Having examined the ledger entry account, exhs P5B(1)–(38) he confirmed that the defendant was indebted to the plaintiff for a sum of S$21,993.41.

The defendant admitted in evidence that Mr William Wee was his agent as stated in cl 7 of the agreement. Further, the terms and conditions of the trading account were clear, giving wide discretion to the plaintiff to sell the shares as and when plaintiff deemed it necessary.

Furthermore, under cl 8(f) of the said agreement, a statement or certificate relating to the defendant's financial affair shall be final, and binding on the defendant unless he challenges the composition within two days of the receipt of the same if the shares were not paid for within the period allowed. These documents were supplied to the defendant, and he made no complaint. On this score alone, he is estopped from challenging it now.

The trial judge made a finding of fact that the sale of the collaterals was not force sale, and that PW1 had good reason to sell the collaterals as he would get a commission from the transaction. The trial judge arrived at this erroneous conclusion without sifting through the evidence adequately adduced at the trial. PW1 stated clearly in evidence that the 287,000 shares were deposited with the plaintiff by the defendant, These shares were sold between 9 January 1985 and 30 July 1985 and the defendant was kept informed of these sales. defendant at no time complained about the sale of the collaterals whether orally or by letter. The collaterals we feel were sold by the plaintiff in accordance to the terms of the agreement, and the sale was sanctioned by the defendant.

A The counterclaim of the defendant was premised on the fact that the plaintiff disposed of the 287,000 shares without his consent, and the sale constituted a wrongful interference with the defendant right to ownership of the shares. The trial judge erred in arriving at the conclusion that the collateral shares were sold without the defendant's consent and knowledge. The plaintiff had in fact given detailed documentary evidence of the share B transactions conducted on behalf of the defendant, such as the plaintiffs hand written ledger, and the Singapore Stock Exchange computed printout, P4A.

The defendant's agent was appointed by him under the terms of the agreement. If in fact the agent did wrongfully dispose of the collaterals, the C defendant should file proceedings against him for any loss suffered.

The evidence of PW1 was crucial in this case. He traced the relationship between him and the defendant. Having met the defendant in Miri on 13 October 1984, the defendant signed the margin account, and deposited 287,000 shares over a period of time with the plaintiff the collateral shares D for pledging in the margin account.

Although no contract notes were produced by the plaintiff to the defendant for reasons given at the trial, there is no dispute that the transactions in P5B(1)–(38) had been earned out. However, the defendant disputed the fact that these transactions were carried out on his instructions. E The contract note we reiterate would not show whether the transactions were made on the instruction of the defendant or not. On this aspect, the evidence of PW1 is most relevant. Although he was working as a remisier at the plaintiffs office he was appointed as agent by the defendant under cl 7 of the agreement between plaintiff and defendant.

F Clause 7 reads as follows:

> I hereby, irrevocably appoint your remisier, dealer, director Wee William (NRIC No 0254979– D) as my agent (hereinafter referred to as 'the agent') to receive all and any notices, statements, certificates, contract notes, demands and proceedings (hereinafter referred to as 'the notices') G that are to be sent to me, I declare that all the notices served and/or signified as received by the agent shall be deemed to be duly served and received by me. I, further agree that all or any payments made by me to the agent shall not be deemed to be payment to you until it is actually in your hands.

H Apart from the 287,000 shares pledged by the defendant, additional collateral shares were deposited with the plaintiff by the defendant. He stated that all the instructions for the sale of the defendant''s shares were received by telephone, and he faithfully carried out defendant's instructions, and the relevant contract notes were sent to the defendant reflecting details of the transactions. The transactions done by the I defendant were recorded by PW1 in a book, and was produced as P2(1–9) at the trial. He stated that the additional collateral shares were given to him because there was a shortfall in the margin.

On 3 September 1985, PW1 was informed by the plaintiff about a shortfall. He immediately informed the defendant by telephone, who promised to top up the shares.

Since the defendant did not top up within five days as stipulated under cl 3(2) of the margin agreement, the plaintiff sold defendant's shares. PW1 stated categorically in evidence that he would pay up, but failed to do so.

Under cross-examination, PW1 denied that when defendant received the letter of demand, he telephoned PW1 who is alleged to have stated that the letter of demand was a mistake, and he would settle the matter.

By the terms of the agreement dated 15 October 1984, the defendant was given a specific period of time within which to dispute any of the contracts entered into. He did not do so, alleging that he had no knowledge of the contract notes, and the statement of account sent to him. In fact, the defendant is bound by the terms of cll 7 and 8 of the agreement which have been referred to earlier.

The learned judge further fell in error in arriving at the above conclusion when he misconstrued the evidence of PW1 on this issue vis-a-vis the contents of the letter dated 5 March 1986 written by the solicitors for plaintiff to the defendant, Upon close scrutiny of the contents of the letter it merely stated that the defendant's shares had been sold by the plaintiff to reduce the indebtedness of the defendant in accordance of the terms of the agreement dated 15 October 1984. In fact, as stated earlier, under cl 5(1)(a) and (b) of the agreement the plaintiff had the right to sell the collateral if the proceeds of sale of shares are insufficient to satisfy the sum owing by the defendant without any notice to be sent to the defendant.

The trial judge also erroneously concluded that the collaterals were sold on the instructions of PW1, as stated by PW1 in his evidence. In fact, all PW1 stated was merely to confirm the practice of the plaintiff to sell collaterals under the terms of the agreement whenever the proceeds of the sale of .shares are insufficient.

We are driven to hold that trial judge's reasoning was flawed in the material issues as to the circumstances under which the collateral was sold, and thus disagree with his finding that plaintiff had disposed of the shares without the instructions of the defendant. We are further fortified in our conclusion by contemporaneous documentary evidence, which we have since ruled admissible.

A matter of interest before us is that judging from the notes of evidence before us the second trial judge was confronted with conflicting evidence from the plaintiffs and defendant's witnesses. Having said this, the second trial judge made no attempt to recall these witnesses for purposes of evaluating their credibility, when he took over conduct of the said case.

The said trial judge, had to our minds, determined the credibility of these witnesses from the sterile print of the notes recorded by the first trial judge. We find this manner of assessment of witnesses slightly discomfiting. To our minds, when an application is made that a case be continued before another judge, and not heard de novo, the presiding judge should be given full liberty to recall, and re-examine any witness, and to re-submit on any point, although the trial may be continued on the evidence of the transcript of the earlier judge's notes (see *Shanmugam v Pitchamany*).

In vain this was not done in this instance. Hence, the assessment of evidence of the second trial judge must be viewed with caution. On our part, however, looking at the evidence, both documentary and oral afresh, we find that the plaintiff has established its claim against the defendant on a balance of probabilities. The defendant's counterclaim, we hold is not tenable, and herein we allow the appeal, and dismiss the counterclaim with costs here and below. Judgment is entered for the plaintiff as prayed. The deposit is to be refunded to the plaintiff.

Appeal allowed and defendant's counterclaim dismissed.

Reported by Sivapragasam Kumaran